United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

564

No. 22137

WESLEY WALKER, JR.

Appellant

-v-

UNITED STATES OF AMERICA

Appellee

Appeal From An Order Of The United States District Court

For The District Of Columbia

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INDEX AND TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

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* Cases chiefly relied upon.

QUESTIONS PRESENTED

1. Whether the instructions of grand and petit Larceny operated an amendment to the written indictment in violation of the Fifth Amendment.

2. Whether the instructions of grand Larceny or petit Larceny violated Appellant's rights under the Sixth Amendment of the Constitution in that Appellant was not properly informed of the nature of the charges against him.

3. Whether the instructions were in violation of the provisions of Rule 30, Federal Rules of Criminal Procedure. That the attorneys were not properly advised of the instructions the Court would give.

4. Whether the Trial Court Amended the indictment by giving the instruction of the lesser included offense of Larceny when the indictment and the Government's case was based on Robbery.

5. Whether the Trial Court abused it's discretion in instructing the Jury on the lesser included offenses of Grand Larceny and Petit Larceny, when the Government's case in chief did not support such an instruction.

6. Whether the Grand Larceny and/or petit Larceny instructions by the Trial Court was an untimely amendment

to the written indictment, in that Appellant was not apprised of the new charges against him until after all evidence was in and the closing arguments made, thereby constituting a denial of due process.

JURISDICTIONAL STATEMENT

This is an Appeal from a judgment in the United States District Court for the District of Columbia. The jurisdiction of the Court is conferred by the United States Court of Appeals, D. C. Rule 17 (c)(2), and Rule 24, Federal Rules of Appellate Procedure.

THIS CASE HAS NOT BEEN BEFORE THIS COURT UNDER ANY TITLE

STATEMENT OF THE CASE

APPELLANT was indicted pursuant to a Grand Jury Indictment, filed May 15, 1967, which charged the Appellant with violation of 22 D. C. Code Sec. 2901(Robbery) in two seperate counts and 22 D. C. Code Sec. 502(Assault with a Dangerous Weapon) in two seperate counts in that:

FIRST COUNT

On or about March 5, 1967, within the District of Columbia, Wesley Walker, Jr., by force and violence and against resistance and by putting in fear, stole and took from the person and from the immediate actual possession of Ervin L. Steele, property of Ervin L. Steele, of the value of about $130.00, consisting of $130.00, in money.

SECOND COUNT

On or about March 5, 1967, within the District of Columbia, Wesley Walker, Jr., assaulted Ervin L. Steele with a dangerous weapon that is a knife.

THIRD COUNT

On or about March 5, 1967, within the District of Columbia, Wesley Walker, Jr., by force and violence and against resistance and by putting in fear, stole and took from the person and from the immediate actual possession of George W. Mullen, property of George W. Mullen, of the value of about $180.00, consisting

of $180.00, in money.

FOURTH COUNT

On or about March 5, 1967, within the District of Columbia, Wesley Walker, Jr., assaulted George W. Mullen with a dangerous weapon, that is a knife.

The Appellant was arraigned on the above indictment Criminal Number 563-67, on May 24, 1967, and entered a plea of not guilty to the respective counts of the indicment. On January 11 and 12, 1967, a jury trial was held before the Honorable Oliver Gasch, United States District Judge, United States District Court for the District of Columbia, Washington, D. C., at the conclusion of which, the Appellant was found not guilty of Counts two and four of the indictment (Assault with a Dangerous Weapon) and guilty of Grand Larceny on Counts one and three of the indicment as a lesser included offense of Robbery. Said verdict was predicated upon the Larceny Instruction given by the Trial Court over the objection of Appellant's Trial Counsel. On the 14th day of June, 1968, sentence was imposed by Judge Gasch, the Appellant receiving a sentence of 20 months to 5 years. The factual pattern of the case is relatively simple and involved the oral testimony of the two complainants, IRVIN LEON STEELE and GEORGE W. MULLEN, for the Government and the oral testimony of the Appellant along with a knife

introduced into evidence by the Government alleged to have been the Appellant's.

Specifically, the complainants, Mr. Steele and Mr. Mullen, were visiting Washington, D. C., on March 4, 1967, and were in attendance at a Mid-Winter Conference of the Veterans of Foreign Wars, held in the city of Washington, D. C. On the night of March 4, 1967, the two complainants along with other conference men socialized at the Blue Mirror Restaurant and had some beer to drink remaining at the said establishment until closing hours at 1:00 A.M., March 5, 1967 (TR-9).

The two complainants left the Blue Mirror Restaurant along with ten fellow delegates and attempted to hail a cab with the apparent intention of returning to their hotel. Eight of the men were successful in securing transportation, two went into a Hot Shoppe Restaurant across the street, leaving Mr. Steele and Mr. Mullen at curbside (TR-10).

While waiting for a cab, the two men were approached by the Appellant who asked them if they wanted some girls (TR-10), After indicating their interest in the affirmative and upon determining the price of the women involved, the three men took a cab and rode to an apartment house in the area of 16th and R Streets, N. W., where the alleged women were waiting.

Upon entering the apartment house and reaching the 4th or

5th floor of said apartment house, via a circular stairway, the Appellant informed the complainants that the people involved were afraid that they (the complainants) were police officers and Appellant requested Steele and Mullen to place their money in an envelope (TR-13). The Appellant testified at the trial that both Steele and Mullen reluctantly placed the money in the envelope and the Appellant then turned his back to the complainants for the purpose of switching the envelope containing paper (TR-66). The complainants become suspicious whereupon a struggle ensued during which the dummy envelope containing paper and the envelope containing the money fell down the stairway whereupon the Appellant fled the scene (TR-82-83).

The Government's case indicated a Robbery at knife point rather than Larceny by trick or what is commonly known as the "Murphy Game". The testimony of both Steele and Mullen was that their money was taken at knife point (TR-13) and (TR-34). Mullen claimed that his sport coat was cut by the alleged knife (TR-33-34). The purported sport coat involved was never introduced into evidence. As a matter of fact, the jury found the Appellant not guilty of the Robbery counts of the indictment but guilty of Grand Larceny as a lesser included offense of Robbery, thereby supporting the Appellant's version as to the facts as being correct as to what transpired, (TR-125-126).

The Appellant quite clearly explained his actions at the trial, "In other words, I was perpertrating a Murphy Game", (TR-78).

Upon the conslusion of the case and after both sides had rested, but before the closing arguments, the Court requested both Counsels to approach the Bench, at which time the Court denied defendant's Motion for a directed verdict of acquital. Counsel for the Government stated "We have no unusual request for instructions, just robbery and assault with a deadly Weapon". The Court stated:

> "Lets go over with you what I intend to give. Function of the Court, Function of the Jury, Jury's Recollection Controls. Evidence in the case, Statement of Counsel, Indictment not Evidence." (TR-84) ******** "Burdon of Proof, Presumption of Innocence, Reasonable Doubt, Direct and Circumstantial Evidenc, Credibility of Witnesses, Falsus In Uno, and Defendant as a Witness."

The defense attorney stated he would accept that, while the Government Counsel stated he would not request it. Court then went on to say:

> "Well, I will give it. No. 27, Flight or Concealment. Intent, specific intent is required. Then robbery. I guess that is about it." (TR-85)

When the closing arguments were concluded, the Court again called the Attorneys to the Bench and for the first time raised the question as to whether he should instruct on the lesser

included offense of Larceny, (TR-86-87-88). At that time the defense Counsel objected to the proposed Larceny charge, and stated:

> "There is no evidence about that. The evidence was that he took the money at knife point. *** *** "The indictment is in terms of knife point. That is what the Government's evidence shows. The defendant says they gave it to him voluntarily." (TR-87)

The Court then stressed the Lamore Case through several pages of the Transcript from Page 86 through Page 100, to the point where he started his instruction.

The Court gave the instructions of (TR-115-119) Larceny as a lesser included offense of Robbery and in his instructions stated that, "is that in Larceny the taking need not be with force or violence or by putting the victim in fear," (TR-117). The Court also stressed the second included lesser offense of Petit Larceny when there was no evidence that even hinted at the taking of value less than $100.00 (TR-119).

The Appellant's Trial Attorney, following the Court's instructions to the jury (TR-123), raised the point and objection to the manner in which the Court delivered the instruction in which the defense counsel contended that the Court supported the statement made by the Trial Counsel for the Government when the Attorney remarked in his closing argument: "attack by draw-

ing a red herring across the case." The attorney was obviously making a statement concerning the social activities of the complaining witnesses. It should be noted here that one complaining witness, STEELE owned and operated a hotel at Gap, Pennsylvania (TR-7), and both complaining witnesses are former members of the Armed Services with overseas or combat service.

The jury found the Appellant guilty of Grand Larceny as to Counts one (1) and three (3) of the indictment and not guilty of all other charges couched in the indictment. (TR-125-126)

STATUTES INVOLVED

The statutes involved appear in the appendix to this brief.

SUMMARY OF ARGUMENT

1. The Appellant was indicted by the Grand Jury of two counts of robbery and two counts of assault with a deadly weapon. At the conclusion of the Government's case, Appellant moved for a directed verdict which the Court denied. Appellant could have refused to take the stand but realizing that a Prima Facia case had been made, took the stand in his own behalf and in effect denied the robbery and assault with a dangerous weapon, but in so doing, did admit to a perpetration of the "Murphy Game", or Larceny by trick. At the conclusion

of the case the Court indicated what instructions it would give, as noted on Pages 5 and 6 of this brief. At the conclusion of closing agruments by counsel, the Court called counsel to the Bench and alluded to the Lamore Case, which case had been carefully briefed by the Trial Judge's former law partner.

2. Inasmuch as the Court gave the Larceny instruction predicated upon Lamore vs. Unites States, 136 f 2d 766, (TR-84), and it being obivous that neither counsel was aware of it, the Appellant contends the conviction should be vacated and set aside. The instructions on the lesser included offense of Larceny are in violation of ,his rights under the Fifth Amendment of the Constitution as supported by Russell vs. The United States, 369 U.S. 749, wherein the Supreme Court observed:

> "To make a subsequent guess as to what is in the minds of the Grand Jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a Grand Jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the Grand Jury which indicted him."

And further supported by Crosby vs. The United States 339 F 2d 743, which held that an indictment may not be jud-

ically amended even with defendant's consent as more fully stated in the argument hereinafter.

3. That the instructions on the lesser included offenses of Grand Larceny and Petit Larceny are in violation of Appellant's rights under the Sixth Amendment of the Constitution in that he was not properly advised of the charges against him.

4. Appellant further contends that the instructions on the lesser included offenses of Grand Larceny and Petit Larceny after closing arguments by counsel is in violation of Rule 30, Federal Rules of Criminal Procedure:

> "At the close of the evidence or at such earlier time during the trial as the Court reasonably directs, any party may file written requests that the Court instruct the Jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. <u>The Court shall inform counsel of its proposed action upon the requests prior to their arguments to the Jury</u>, but the Court shall instruct the Jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereat before the Jury retires to consider it's verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury. As amended Feb. 28, 1966, eff. July 1, 1966.

This contention is supported by Wright vs. The United States, 339 F 2d 58, the Court held:

> "The object of this rule, requiring the Court to inform counsel of it's proposed action upon requested instructions before argument, was to require judge to inform lawyers in fair way what charge is going to be, so that they may intelligently argue the case." x x x x "Court's response to defense counsel's request as to which of requested instructions court would accept. "that court would give general instructions and would instruct on the law involved" - was not adequate compliance with requirements that court inform counsel before argument, even if requested instructions were faulty."

Due to the failure of the Court to bring to light the Lamore case, prior to the Appellant taking the stand in his own behalf, as well as the Court's failure to mention it before argument to defense counsel, an entrapment was effectuated, compelling the Appellant to testify in his own behalf to matters he would not have otherwise done.

STATEMENT OF POINTS

1. The Court erred in giving the instruction on the lesser included offense of Larceny, thereby amending a written indictment by the Grand Jury, in violation of Appellant's rights under the Fifth Amendment and to the detriment of Appelant as supported by Russell vs. The United States and Crosby vs. The United States, Supra.

2. The Court erred in that the action taken by the Trial Court resulted in a convication of charges not anticipated by the Appellant nor the Government to his detriment, and in violation of his rights under the Sixth Amendment of the Consitution in that he was not properly notified. of the added charges against him.

3. The Court erred in waiting until all evidence was in and arguments presented to disclose the fact he was going to give the instruction based on the lesser included offense of Larceny, thereby amending the written indictment, to the detriment of Appellant and in violation of Rule 30, Federal Rules of Criminal Procedure as supported by Wright vs. The United States.

ARGUMENT

The Trial Court erred in giving the lesser included instruction of Larceny in violation of the Fifth Amendment of the Constitution in that the indictment by the Grand Jury did not include the crime of Larceny.

FIFTH AMENDMENT TO CONSITUTION

> No person shall be held to answer for a capital, or otherwise, infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or

> Public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property be taken for public use, without just compensation.

In Russell vs. The United States, 369 U.S. 749 (1962), the Supreme Court observed:

> "To make a subsequent guess as to what is in the minds of the Grand Jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a Grand Jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the Grand Jury which indicted him."

In the case before the Court herein, the defendant was convicted of a charge not presented to the Grand Jury. A third count of Larceny should have been presented under 31 Stat. 1324, Chapter 854, Section 826, as amended and as incorporated in Section 22-2201, District of Columbia Code, 1967 Edition, and set forth more fully in the Appendix herein.

In the case of Crosby vs. The United States, 339 F 2d 743 (D.C. 1964) the Court held an indictment may not be judicially amended even with defendant's consent. The Court stated:

> "Since we find that the offense of assault with a dangerous weapon is not necessairly

> included in an indictment charging robbery, we must find that the Trial Court lacked jurisdiction to convict Appellant of that offense under the present indictment. To hold otherwise would in effect be to allow judicial amendment of the Grand Jury's indictment."

The only defference in the case here before the Court is that larceny, by the Court's charge, is the lesser included offense of Robbery. The cases of Russell vs. The United States, Supra, and Crosby vs. The United States, Supra, both support Appellant's contention that the Court erred and in so doing violated the Fifth and Sixth Amendments to the Constitution.

As stated, the Trial Court erred in giving the charge of the lesser included offense of Larceny and in so doing violated Appellant's rights under the Sixth Amendment of Constitution in that Appellant was not informed of the nature of the accusation of Larceny.

SIXTH AMENDMENT TO CONSTITUTION

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation: to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have

Assistance of Counsel for his defense.

It is abundently clear that neither Trial Counsel requested nor did they expect the lesser included instruction on Larceny. The untimely instruction in this case amounted to a judicial amendment to the indictment, thereby prejudicing Appellant for want of notification of the additional charges of Larceny as covered in the instructions.

The Trial Court erred in giving the instruction on the lesser included offense of Larceny and in so doing violated Rule 30, Federal Rules of Criminal Procedure:

> "At the close of the evidence or at such earlier time during the trial as the Court reasonably directs, any party may file written requests that the Court instruct the jury on the law as set forth in the requests. St the same time copies of such requests shall be furnished to adverse parties. <u>The Court shall inform counsel of its proposed action upon the requests prior to their arguments to the Jury</u>, but the Court shall instruct the Jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereat before the Jury retires to consider it's verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury. As amended Feb. 28, 1966, eff. July 1, 1966.

The Court's clearly proposed instructions, prior to closing arguments, gave no hint as to the instructions of the lesser included offense of Larceny (TR-84). This was after the evidence had been introduced and on which the respecrive Trial Counsels based their final arguments to the jury.

In Wright vs. The United States, (Calif. 1964) 339 F 2d 578, the Court held:

> "The object of the rule, requiring the Court to inform counsel of it's proposed action upon requested instructions before argument, was to require judge to inform lawyers in fair way what charge is going to be, so that they may intelligently argue the case." x x x x "Court's response to defense counsel's request as to which of requested instructions court would accpt, "that court would give general instructions and would instruct on the law involved" - was not adequate compliance with requirements that court inform counsel before argument, even if requested instructions were faulty."

Appellant is sure that his Court appointed attorney would have changed his argument if he had any knowledge that the Court intended to give the lesser includedooffense of Larceny. Appellant is also confident his Court appointed defense counsel would have employed other defensive strategy had he been advised by the Court of the Lamore Case prior to presenting the defense in behalf of Appellant.

It is true that the arguments are not transcribed nor are they a part of the evidence in the case, nor does the Appellant know what weight if any, the Jury gave to the arguments. Appellant, however, fully contends and this case proves that the Jury gives a great deal of weight to the charge by the Court as supported in Pope vs. The United States (Texas, 1962) 298 F 2d 507;

> "Jurors decide facts in accordance with Rules of law as stated in instructions of Court."

Appellant also contends that it is obvious that the Court was reminded of the Lamore Case by something said in the arguments which accounted for the instructions on the lesser included offense of Larceny.

When called to the Bench after the evicence had been presented and before final arguments, the attorney for the Government (TR-84), stated:

> "We have no unusual request for instructions, just robbery and assault with a deadly weapon, x x x x your honor usually gives circumstantial evidence instructions."

To which the Court replied:

> "Yes. Let me go over with you what I intend to give."

But the Court made no mention of the lesser included offense. At the conclusion of the arguments the Court again

called both trial counsel to the Bench and for the first time inquired about the instruction of the lesser included offense of Larceny, citing Lamore vs. The Unites States, 136 F 2d 766, decided May 29, 1943, and remarked that it was a case handled by his former law partner.

It should be noted at this point that the Lamore Case, supra, as well as in Irby vs. United States, 390 F 2d 440, that burgulary (the common law predecessor to house breaking) and robbery were considered to be aggrevated forms of the same Crime, Larceny.

When Lamore vs. the United States, supra, was decided the Trial Court clearly pointed out that no case had been decided in this jurisdiction on the point nor has there been a case since then decided in this jurisdiction on the point. Lamore cited 3 Bouvier's Law Dictionary as follows:

> "Robbery by the Common Law, is larceny from the person accompanied by violence or by putting in fear; and an indictment therefor must allege that the taking was from the person, and that it was by violence or by putting in fear, in addition to the averments that are necessary in indictments for other larcenies."

By statute and as incorporated in the District of Columbia Code Robbery and Larceny are categorized as two seperate offenses. Robbery being under 31 Stat. 1322

Chap. 854, Section 810, District of Columbia Code, 1967, Edition, Section-2901, and describes Robbery the same as at Common Law but does not include Larceny. Larceny by 31 Stat. 1324, Chap. 854, Sec. 826, as amended, District of Columbia Code, 1967 Edition, Sec. ss-2201. Both being set forth in Appendix of this brief.

In the case before the Trial Court, the evidence did not indicate a factual pattern of force or fear since the jury found Appellant not guilty of all four counts of the indictment as written and presented. The Jury, however, found Appellant guilty of counts one and three of the indictment on the lesser included offense of Larceny.

The Trial Court not only instructed on Grand Larceny (TR-115-119), but also gave an instruction on the second lesser included offense of Petit Larceny. (TR-119)

The following cases held that an instruction should not be given on a lesser included offense unless the evidence was sufficient to justify it; Burcham vs. The United States, 82 App. D.C. 283 (1947); Goodall vs. United States, 86 U.S. App. DC, 148 (1950), and Green vs. United States, 95 U.S. App. D.C. 45 (1955).

In the instant case before the Trial Court, there was no evidence by the Government that would justify the

instruction of Larceny. Any evidence in the case, that would in any way support Larceny, was introduced by the Appellant in his own defense, and upon which evidence, the Larceny charge, was predicated resulting in self conviction. The instruction predicated upon the Appellant's case in chief was the basis for conviction and not the Government's evidence.

The difference in this case as compared to Lamore and other cases referred to by the Trial Court and the Government is that the other cases were reversed because defense counsel requested the lesser included instruction and the respective Trial Courts refused to grant them. In the instant case before the Court neither attorney requested the Larceny instructions. In fact the instructions were given over the objections of the defense counsel, (TR-87-93). The Appellant, therefore, preserved his right to bring this error before the Court in compliance with Rule 30, Federal Rules of Criminal Procedure. The Larceny instruction was also given after the Government clearly stated it wanted the charges of Robbery and Assault with deadly weapon only.

It is the contention of the Appellant that the Lamore case does not apply in this case and the Lamore case should be overruled as not being good law today.

It is further contended by the Appellant that the instant case before the Court should be reversed and in so doing establish that it is error for the Trial Court to wait until all evidence and arguments are presented, as in this case, to instruct on any lesser included offense that has not been introduced into evidence by the Government during the trial. That it is also inviolation of defendants rights as guaranted by the Fifth and Sixth Amendments of the Constitution. To permit such a practice would work a hardship upon defendants and make it impossible in some cases to present adequate defenses. If the Government is not on notice of other lesser included offenses, as was the case herein, and the Court steps in and controls the prosecution, the burden then shifts to the defendant, who up to that time is unaware of the fact he is faced with additional charges and at which time it is too late to defend as he, in all probability has convicted himself in attempting to defend the written charges, which happened herein.

CONCLUSION

For all the reasons stated above the Appellant respt-fully submits that the Lower Court erred in giving the instructions on the lesser included offense of Larceny. When the Government's case in chief did not support it nor

was the instruction asked for by either the Appellant nor by the Government at the conclusion of it's case and not until after all arguments of counsel, and not then until after the Trial Court made the suggestion and kept stressing the instruction. That the instructions were contrary to the rights of the Appellant under the provisions of the Fifth and Sixth Amendments of the Constitution and contrary to the provisions of Rule 30, Federal Rules of Criminal Procedure. It is, therefore, respectfully requested that this Court reverse and vacate the Judgment of Conviction.

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APPENDIX

The statutes involved in this case are as follows:

March 3, 1901, 31 Stat. 1322, Chapter 854, Section 810, and incorporated in District of Columbia Code, 1967, Edition, Section 22-2901 provides as follows:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

March 3, 1901; 31 Stat. 1321, Chapter 854, Section 804, and incorporated in District of Columbia Code, 1967, Edition, Section 22-502, provides as follows:

> Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years.

March 3, 1901; 31 Stat. 1324, Chapter 854, Section 826; Aug. 12, 1937, 50 Stat. 628, Chapter 599; June 29, 1953, 57 Stat. 99, Chapter 159, Section 215(a); incorporated in District of Columbia Code, 1967 Edition, Section 22-2201, provides as follows:

> Whoever shall feloniously take and carry away anything of value of the amount or value of $100.00 or upward, including things savoring of the realty, shall suffer imprisonment

for not less than one nor more than ten years.

FIFTH AMENDMENT TO CONSTITUTION

No person shall be held to answer for a capital, or otherwise, infamous crime, unless on a presentment or indictment of a Grand Jury, except incases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT TO CONSTITUTION

I In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Rule 30, Rules of Criminal Procedure (Federal)

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The Court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereat before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury. As amended Feb. 28, 1966, Eff. July 1, 1966.

[illegible]

[illegible]

[illegible]

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,137

WESLEY WALKER, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

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THOMAS M. SUSMAN,
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INDEX

TABLE OF CASES

OTHER REFERENCES

ISSUES PRESENTED *

In the opinion of the Government, the following issues are presented:

1. Whether the trial court committed reversible error in charging the jury on larceny as a lesser included offense of robbery.

(a) Whether larceny is a lesser included offense of robbery in the District of Columbia.

(b) Whether the indictment was sufficient to support and to put the defendant on notice of a charge of larceny.

(c) Whether the evidence was sufficient to support a charge of larceny.

2. Whether the trial court committed reversible error in not informing counsel, before closing argument, that a larceny charge would be given.

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* This case was not previously before this Court under the same or a similar title.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,137

WESLEY WALKER, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

January 11, 1968, Wesley Walker, Jr., was tried before a jury in the United States District Court for the District of Columbia, Honorable Oliver Gasch, presiding. Walker had been indicted on two counts of robbery and two counts of assault with a deadly weapon. The jury brought in a verdict of not guilty on the assault counts and guilty under the two robbery counts of the lesser included offense of larceny. Walker here appeals the larceny conviction. The facts supporting that conviction, as brought out in the trial, are as follows:

a. The Crime

Irvin L. Steel and George W. Mullen, two veterans of service in the Second World War, were visiting the District of Columbia on March 4, 1967. They had come to the District from their homes in Pennsylvania to attend the Mid-Winter Conference of the Veterans of Foreign Wars. On the night of March 4, 1967, Steel and Mullen and ten other veterans were socializing at the Blue Mirror Restaurant, 14th and New York Avenue. After a few beers the twelve delegates left the restaurant. This was at about 1:00 a.m. on Sunday, March 5, when the restaurant closed.

Eight of the delegates were able to get taxis to return to their hotels; two others went into the Hot Shoppe Restaurant across the street. Steel and Mullen waited at curbside for a cab. (Tr. 9, 10, 31, 33.)

While waiting for a cab, Steel and Mullen were approached by Walker, the defendant, who asked them if they wanted a girl. They asked the price and when Walker answered $5, they indicated their interest. All three men then got a taxi and rode to an apartment house near 16th and R Streets, N. W.

Steel and Mullen entered the apartment house and followed Walker to the fourth or fifth floor. The men walked up a circular stairway; Walker indicated that the prostitutes were upstairs. At this point the testimony varies as to how Walker relieved Steel and Mullen of their money, and how much money was taken. (Tr. 10, 13, 32, 34.)

Steel and Mullen testified that Walker asked them for their money, because "the girls" were afraid they might be police with marked bills. When they refused, Walker pulled a small knife, threatened them, and slashed Mullen's coat, at which time they handed over their money (Steel, $130; Mullen, $180). Walker then disappeared with the money. (Tr. 13, 14, 17, 25, 34.)

Walker testified that he had taken some money but that he did it through perpetrating a "Murphy game." Walker testified that while he owned the

knife that the government had introduced in evidence, he did not have it with him on the morning in question. (Tr. 64-66, 73, 76, 78.)

In essence, Walker admitted to taking money from the complainants; he had intended to put the money in an envelope and to switch envelopes, escaping with the money and leaving Steel and Mullen with shredded newspaper. Mullen, he said, caught him in the act, so he fled with the money before going through the entire game.

b. The Trial

Thus the only factual dispute at the trial below was not whether Walker took any money from the complainants, but how he took it and how much he took.

After presentation of the evidence but before closing arguments, the trial judge called both counsel to the bench. The judge denied defense counsel's request for a directed verdict of acquittal and went over briefly the elements of the proposed charge. The judge did not at that time mention the lesser included offense of larceny as a possible element of the charge.

After the prosecution and defense had completed closing arguments to the jury, the judge called counsel to the bench and discussed the propriety of his instructing the jury on larceny as a lesser included offense to robbery. The judge cited the *Lamore* case and concluded, in accord with the government's request, that larceny should be charged as a lesser included offense. (Tr. 87, 88, 91, 96.)

Walker's counsel objected to the larceny instruction, which objection was overruled. The jury then returned a verdict of guilty of grand larceny under counts 1 and 3 of the indictment and not guilty of the assault charges.

SUMMARY OF ARGUMENT

The *Lamore* case and later authority approving it firmly establish that in the District of Columbia, as elsewhere, larceny is a lesser included offense of robbery. Thus, under a robbery indictment, the trial court can properly charge the jury on larceny if it is supported by the evidence. In this case the robbery indictment plainly put the defendant on notice that a larceny charge might be given the jury, and the defendant's testimony—taken with the other evidence—established a basis in the evidence for such a charge. Thus the trial court properly instructed the jury that the defendant could be found guilty of larceny as a lesser included offense to robbery.

The trial court did not inform counsel before closing argument that a larceny charge would be given, but since larceny is a lesser offense and was raised by the evidence, defense counsel could not have been taken by surprise by the charge. He had not submitted written instructions, and thus there was no basis for the court's informing him of any disposition before the argument.

Even if the trial judge violated Rule 30 by omitting to inform the defendant of the larceny charge before closing argument, such omission was harmless error and did not affect the defendant's substantial rights. Thus the conviction below should not be reversed.

ARGUMENT

I. The trial court properly instructed the jury that the defendant could be found guilty of larceny as a lesser included offense to robbery.

A. *In the District of Columbia, as elsewhere, larceny is a lesser included offense of robbery.*

After the evidence was in and the arguments concluded, the trial judge discussed with counsel his intention to charge the jury on the lesser included offense of larceny. After extended conversation with counsel, the judge pro-

ceeded to charge the jury on the counts of robbery and assault, in accordance with the indictment, and on lesser included counts of grand and petit larceny. Counsel at trial objected that larceny was not a lesser included offense of robbery and that the evidence did not support such a charge. The court overruled the objections, referring to the *Lamore* case. On appeal counsel renews the argument that larceny is not a lesser included offense of robbery. As to the *Lamore* case, the defendant asserts that it "should be overruled as not being good law today." Brief for Appellant at 20.

Thus the threshhold question is whether larceny is a lesser included offense of robbery in the District of Columbia, and any discussion of this question must begin with the case of *Lamore* v. *United States*, 78 U.S. App. D.C. 12, 136 F.2d 766 (1943). *Lamore* was a unanimous opinion in this Circuit, dealing with only one issue—the issue presented here. The Court's opinion, with footnotes omitted, is quoted in full below:

> "Only one question is presented on this appeal, namely, whether, upon an indictment charging robbery, appellant could properly be convicted of larceny. Counsel for appellant and for the government agree that no case in this jurisdiction has declared the law expressly upon the point; although, in several cases, the general proposition has been recognized that such a conviction is proper for a lesser constituent offense. Section 1035 of the Revised Statutes provides that: 'In all criminal cases the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charged, if such attempt be itself a separate offense.'
>
> "Robbery was defined by the common-law writers as a species of *aggravated larceny*. The two offenses were described as 'intimately connected, the one being included in the other.' The language of the early cases indicates general acceptance of this proposition.

> Thus, in Merriman v. The Hundred of Chippenham: 'It was objected to be no robbery; there being no force used; *but only larceny.*' [Italics supplied.] Conviction of larceny upon indictment for robbery was common practice. The question of the present case may be considered as well settled, therefore, both at common law and in the uniform practice of the courts throughout the United States. We see no reason for reopening the question or giving serious consideration to another possibility. No reason, persuasive or plausible, is urged for doing so in the present case.
>
> "Affirmed."

The Government realizes that "The doctrine of lesser included offenses is not without difficulty in any area of the criminal law." *Fuller* v. *United States*, No. 19,532, D. C. Cir., September 26, 1968, slip opinion at 14. However, if any branch of the doctrine is settled, it is that involving larceny as a lesser offense of robbery.

Lamore does not stand alone in this jurisdiction; the case—and the proposition it stands for—was cited later the same year in *Edwards* v. *United States*, 78 U.S. App. D.C. 226, 229, 139 F.2d 365, 368 (1943), *cert. denied*, 321 U.S. 769, where the Court observed: "Housebreaking, robbery and burglary are merely aggravated forms of larceny."

And in *Younger* v. *United States*, 105 U.S. App. D.C. 53, 263 F.2d 735 (1959), *cert. denied* 360 U.S. 905, Judge Bastian writing for the Court discussed *Lamore* with approval in upholding a conviction based on taking indecent liberties with children as a lesser included offense of assault with intent to commit rape.

Finally, in 1967 Judges Bazelon and Wright, dissenting in the *en banc* rehearing in *Irby* v. *United States*, U.S. App. D.C. , 390 F.2d 432, 440 (1967), wrote: "It may be that housebreaking and robbery were distinct offenses at common law. It should be noted, though, that both burglary (the common law predecessor of housebreaking) and robbery were thought to be aggravated forms of

the same crime—larceny." In a footnote to this statement the Court wrote:

> "For the relationship between robbery and larceny, see, *e.g.*, Lamore v. United States, 78 U.S. App. D.C. 12, 136 F.2d 766 (1943); Turner v. United States, 57 U.S. App. D.C. 39, 16 F.2d 535 (1926); United States v. Sims, 27 Fed. Case. p. 1080, No. 16,290 (C.C.D.C. 1835); 2 Bishop, Criminal Law § 1156 (9th ed. 1923)."

Other circuits have cited *Lamore* approvingly. In *Rutkowski* v. *United States*, 149 F.2d 481, 482 (6th Cir. 1945), the Court used the following language:

> "Under the statute involved here, to sustain the robbery charge, evidence of forcible taking or a taking by putting the individual robbed in fear, is essential, while to sustain the charge of felonious taking only the elements of ordinary larceny need be proved. Other and additional proof than that needed for larceny is required to establish the crime of robbery, and in this sense the two offenses are distinct and separate. If the crime of robbery has been made out, however, no additional proof is required to establish the crime of larceny. There may be larceny without robbery, but there can be no robbery without larceny, for robbery includes larceny. [Citing *Lamore.*] Robbery is in fact larceny committed by violence, and includes stealing and asportation as well as assault. [Citing other cases.]"

Rule 31(c) provides that a defendant "may be found guilty of an offense necessarily included in the offense charged." 8 *Moore's Federal Practice* ¶ 31.03 (2d ed. 1968) uses as a primary example of a necessarily-included offense as "robbery-larceny. It is impossible to commit robbery without having first committed larceny. [Citing Larson v. United States, 296 F.2d 80 (10th Cir. 1961).]" And lower down on the same page: "A distinction must be made between a necessarily-included offense and a lesser-included offense. The former denotes a relationship which always exists between two offense categories, such as lar-

ceny and robbery, regardless of the facts of the particular case."

Other scholars agree. For example, 2 *Wharton's Criminal Law and Procedure* § 547 (Anderson, 12th ed. 1957) points out that "Larceny, although an essential element of the offense of robbery, is distinguished primarily on the basis of the violence which precedes or accompanies the taking. The presence of violence, actual or constructive, is an essential ingredient of robbery but not of larceny. Thus robbery is a compound of aggravated larceny, composed of the crime of larceny from the person with the aggravation of force, actual or constructive, used in the taking."

This Court has generally discussed and applied other branches of the lesser included offense doctrine in *Crosby* v. *United States*, U.S. App. D.C. , 339 F.2d 743 (1964), in *Kelly* v. *United States*, U.S. App. D.C. , 370 F.2d 227 (1966), *cert. denied*, 388 U.S. 913, and most recently in *Fuller* v. *United States*, *supra* (discussed more fully below). In light of these general cases, the secondary authority, and the cases from this and other circuits approving *Lamore*, the Government is confident that *Lamore* still represents the law of this Circuit. And properly so. As the Court in Lamore pointed out, apropos to the present appeal, no reason has been brought out—"persuasive or plausible"—for giving serious consideration to another possibility. The trial judge below properly instructed the jury on the law governing the case.

B. *The indictment in this case was sufficient to support and to put the defendant on notice to a charge of larceny.*

The defendant was indicted on two counts of robbery before the Grand Jury. The robbery counts in the indictment basically read:

> "On or about March 5, 1967, within the District of Columbia, Wesley Walker, Jr., by force and violence and against resistance and by putting in fear, stole and took from the person and from the immediate

> actual possession of [complainant] property of [complainant], of the value of about $[x], consisting of $[x] in money."

The indictment fairly tracks 22 D.C. Code § 2901, which provides that "Whoever by force or violence, . . . shall take from the person or immediate actual possession of another anything of value, is guilty of robbery." Larceny, as defined in the Code, §§ 2201-02, does not require any element of force or violence.

The defendant argues that under the robbery indictment, he was deprived of his Fifth and Sixth Amendment rights in not being properly indicted before a Grand Jury and not being informed of the charges against him. He cites cases to the effect that the court cannot change the indictment and that the defendant cannot be convicted on facts not presented to the Grand Jury. Were larceny not a lesser included offense of robbery, the defendant's arguments might have some merit. But since larceny is a lesser offense, as established above, the defense counsel is put on sufficient notice by the indictment as drawn that a larceny conviction is possible.

Volume 2 of the *Trial Manual for the Defense of Criminal Cases*, by Amsterdam, Segal and Miller, at pages 335-36, points out that "It is particularly important that counsel have a position on the submission of lesser included offenses. The general principle theoretically applicable here is that the court may (and ordinarily must on request of counsel) submit to the jury any offenses that are lesser included offenses of the crime charged in the charging paper, and upon which the evidence would support a conviction." Other secondary authorities generally agree that where warranted by the evidence, the trial judge may properly—and indeed, perhaps must—instruct the jury on any lesser included offenses. See Comment, *Submission of Lesser Included Offenses to the Jury*, 38 Neb. L. Rev. 804, 809 (1959); Note, *Submission of Lesser Crimes*, 56 Colum. L. Rev. 888, 901 (1956).

A general discussion of the doctrine of lesser included offenses is found in Judge Leventhal's opinion for this

Court, sitting *en banc* in *Fuller* v. *United States*, No. 19,532, D.C. Cir., September 26, 1968, slip opinion at 13:

> "There is however another strand of legal theory which must be taken into account, the doctrine of lesser included offenses. When a greater and lesser offense are charged to the jury, the proper course is to tell the jury to consider first the greater offense, and to move on to consideration of the lesser offense only if they have some reasonable doubt as to guilt of the greater offense. A jury that finds guilt as to the greater offense does not enter a verdict concerning guilt of the greater offense. The reason for this absence of consideration is not any inconsislency between the offenses. It rather reflects the very 'inclusion' that defines the lesser offense as one 'included' in the greater. A lesser included offense is one which is necessarily established by proof of the greater offense, and which is properly submitted to the jury, should the prosecution's proof fail to establish guilt of the greater offense charged, without necessity of multiple indictment."

The application of the doctrine in *Fuller* involved degrees of homicide, and the Court concluded that "What is clear from our cases is that the jury may be instructed on second degree murder as a 'lesser included offense' even though the indictment is solely for felony-murder." Slip opinion at 16.

In *Fuller* the defendant argued on appeal that an indictment for felony-murder was insufficient notice that he might have to defend against a charge of intentional but not premeditated murder, just as in this case the defendant here argues that a robbery indictment was insufficient notice that he would have to defend against a charge of larceny. This Court answered this contention in *Fuller*, slip opinion at 17, as follows:

> "But an indictment for murder must be read in the light of the history of the crime. Counsel retained or assigned to defend a man accused of felony-murder are not misled. They are aware that the facts of the homicide are to be brought out, that a verdict of sec-

> ond degree murder is appropriate if there is proof from which the jury might reasonably find that the defendant did not commit one of the enumerated felonies but was guilty of an intentional killing on impulse, and that on this state of proof a charge of second degree murder as a lesser included offense may be requested by prosecution or defense. In short, as Judge Edgerton put it, the felony-murder 'indictment and our decisions fully apprised the defendant of what he must be prepared to meet' on the issue of second degree murder." [Footnote omitted.]

So also, in the present case, must the indictment for robbery be read in light of the history of the crime. Thus, counsel is sufficiently put on notice by a robbery indictment and cannot later argue to have been misled. In fact, the trial counsel below did not even suggest to the judge that he was in any way misled by the indictment. He merely argued that larceny was not a lesser included offense of robbery—*i.e.*, that the *Lamore* case was no longer good law—and that the evidence did not support the larceny charge. Therefore, although the defendant on appeal tries to hang his argument on propositions of constitutional proportion, it is clear that his initial premises cannot be sustained. For the robbery indictment by all legal standards fully informed the defendant of the possibility of a larceny charge against him, and the defendant's testimony during the course of the trial—admitting of the larceny—further sealed the probability that such a charge would be given.

C. *The evidence in this case was sufficient to support a charge of larceny.*

It is clear, and this Court has so held in *Burcham* v. *United States*, 82 U.S. App. D.C. 283, 163 F.2d 761 (1947), that for a defendant to be found guilty of a lesser included offense there must be evidence to justify an instruction on the lesser offense. *Sansone* v. *United States*, 380 U.S. 343, 85 S.Ct. 1004, 13 L.Ed.2d 882 (1965). The defense counsel below argued that the evidence did

not support such a charge (Tr. 93), and this argument is renewed on appeal.

It is plain that the evidence brought out at the trial supported the larceny charge. The complaining witnesses testified that the defendant took $130 and $180 from them respectively (Tr. 14, 25) and after a brief struggle got away with the money (Tr. 15, 35). They also testified that the defendant used a knife (Tr. 13, 34). From this alone, the jury could have decided not to believe the complainants concerning the knife but to believe that their money was taken from them against their will. But this was not all.

The defendant took the stand and testified that he approached Steel and Mullen with no intention to find them women. (Tr. 78.) He did intend to relieve them "of all personal belongings" (Tr. 76), to "betray their trust" (*id.*); in short, the defendant admitted to perpetrating a confidence game. (*Id.*) He was unclear as to how much money was involved (Tr. 65) and never expressly said he ran off with the money (Tr. 66).

In overruling the defense counsel's objection to the lesser offense charge as not supported by the evidence, the trial judge observed:

> "The jury will be instructed to take into consideration not the defense evidence, not the Government's evidence, but all the evidence in the case and then the jury bcomes a fact-finder. They ascertain what the facts are in the case." (Tr. 94.)

After summarily reviewing the evidence (out of the jury's presence), the judge concluded: "I think under some of the evidence in this case which the jury may credit, there is a basis for a larceny charge as a lesser included of the indictment." (Tr. 95.) This was all that was necessary for the charge—not that the evidence be undisputed that the defendant was guilty of larceny, but only that there was some creditable evidence that would support the charge. The Government perceives more than some creditable evidence; in our view, the larceny charge is completely supported by the evidence taken severally or as a whole.

Thus the indictment and the evidence were sufficient to support the court's charge of larceny, and the court did not err in so charging the jury.

II. The trial court did not commit reversible error in not informing counsel before closing argument that a larceny charge would be given.

As can be clearly seen from the above argument, the trial judge acted entirely properly when he charged the jury that it could find Walker guilty of larceny—either grand or petit—as a lesser included offense of robbery. As such a charge was not requested by the defendant, it was within the discretion of the judge to give it. The judge obviously concluded that the evidence supported such a charge, so in the exercise of his discretion he properly included it in the instructions.

Although the instruction concerning larceny was properly given, counsel for the defense and for the Government were not informed that it would be given until *after* their arguments to the jury. This, contends the defendant, violated Rule 30 of the Federal Rules of Criminal Procedure and thus constitutes grounds for reversal on appeal. This contention must be rejected.

Rule 30 provides that

> "At the close of the evidence or at such earlier time during the trial as the Court reasonably directs, any party may file written requests that the Court instruct the jury on the law as set forth in the requests. At the same time, copies of such requests shall be furnished to adverse parties. *The Court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury.*" (Emphasis added.)

The italicized language above, taken literally, would imply that if either party makes specific written requests for instructions, the trial court need only inform counsel of its action *on those requests* prior to the jury arguments. Thus when counsel makes no written requests, as in the present case, the court is under no obligation to

disclose its proposed charge until after the argument, *so long as both parties are given opportunity to object to the proposed charge or any part thereof.* See Rule 30 in its entirety.

While this may be the plain import of the rule, one early case, citing no authority, viewed the object of Rule 30 as "to require the judge to inform the trial lawyers in a fair way what the charge is going to be, so that they may intelligibly argue the case to the jury." *Ross* v. *United States*, 180 F.2d 160, 165 (6th Cir. 1950), *cert. denied*, 344 U.S. 832. Under this broad interpretation, it might be argued that the trial judge violated Rule 30 in not informing counsel before argument that he was going to charge the jury on the lesser included offense. Assuming that the rule, so interpreted, was in fact violated in this case, two issues emerge: whether the defense counsel was in fact caught off guard and was unable intelligibly to argue the case because of the trial court's omission, and if not, whether the court's omission could amount to more than harmless error.

The defendant argues in his brief at page 16 that "Appellant is sure that his Court appointed attorney would have changed his argument if he had any knowledge that the Court intended to give the lesser included offense of Larceny." The Government's argument above, at pages 4-11, clearly shows that the indictment and evidence were sufficient to support and put the defendant on notice of a charge of larceny as a lesser included offense to robbery. For emphasis, however, the precise language of Judge Levanthal's *en banc* opinion in the Fuller case, slip opinion at page 17, is again set out. Only the crimes in the present case are different:

> "But an indictment for murder must be read in the light of the history of the crime. Counsel retained or assigned to defend a man accused of felony-murder are not misled. They are aware that the facts of the homicide are to be brought out, that a verdict of second degree murder is appropriate if there is proof from which the jury might reasonably find that the

> defendant did not commit one of the enumerated felonies but was guilty of an intentional killing on impulse, and that on this state of proof a charge of second degree murder as a lesser included offense may be requested by prosecution or defense. In short, as Judge Edgerton put it, the felony-murder 'indictment and our decisions fully apprised the defendant of what he must be prepared to meet' on the issue of second degree murder."

In the instant case all of the elements constituting the offense of larceny in this jurisdiction had been put into evidence before counsel began closing arguments. After defense counsel concluded his argument and was informed of the larceny charge, he objected on two grounds: 1) that the *Lamore* case, *supra*, was no longer good law in the District and thus that a jury could not be instructed on larceny as a lesser included offense of robbery, and 2) that the evidence did not support the charge of larceny. (Tr. 92-93.) At no time did defense counsel complain that he was informed too late of the proposed larceny charge. At no time did he suggest that his argument would have been different if he had known of the proposed charge. Nor did he ask for additional time to argue in light of the larceny charge. Thus this ground of objection to the trial court's action was not even raised below. All this Court has before it on this issue is, then, appellate counsel's bold assertion that trial counsel might for some undisclosed reason have argued in some undisclosed way differently had he known beforehand of the larceny charge. Clearly this is not enough to warant reversal.

In *Irwin* v. *United States*, 338 F.2d 770 (9th Cir. 1964), *cert. denied*, 381 U.S. 911, 919, the defendant argued on appeal that the trial court did not discuss or disclose before argument all of the instructions that it intended to give to the jury. The Court answered, 338 F.2d at 777:

> "But assuming that there was a failure to comply with Rule 30 which can be noticed on review [the defendant had not objected below to the trial court's

> failure to comply with the rule], no prejudice resulted, since we find no error in the giving or withholding of instructions, and it has not been indicated how counsel for appellants were hampered thereby in arguing to the jury."

The Ninth Circuit has taken the same approach in two other cases. In a *per curiam* opinion in *Watada* v. *United States*, 301 F.2d 869, 870 (9th Cir. 1962), the Court observed that "Since counsel for appellant was in no manner inhibited or restricted in his argument to the jury, we find no prejudice to the appellant by the failure of the court to observe the provisions of Rule 30 . . . ." In *Carbo* v. *United States*, 314 F.2d 718 (9th Cir. 1963), *cert. denied*, 377 U.S. 953, 961, 1010, the trial court rejected all of the defendant's requests for instructions and refused to inform counsel of the precise form the charge would take. On appeal, the Court observed that even if this constituted a violation of Rule 30, no prejudice resulted to the defendant. "Appellants' arguments to the jury consumed four days and no suggestion has been given us as to how they might have been made more effective had the court fully and precisely disclosed the substance of its charge. Therefore, we find no reversible error." 314 F.2d at 745-46. To the same effect see the Fifth Circuit's opinion in *Steinberg* v. *United States*, 162 F.2d 120 (5th Cir. 1947), *cert. denied*, 332 U.S. 808 ("If error, it is here of an inconsequential sort and ought not to set aside the trial").

The defendant cites *Wright* v. *United States*, 339 F.2d 578 (9th Cir. 1964), as authority for reversing his present conviction. The defendant quotes from that case, on page 16 of his brief, as follows:

> "Court's response to defense counsel's request as to which of requested instructions court would accept, 'that court would give general instructions and would instruct on the law involved'—was not adequate compliance with requirements that court inform counsel before argument, even if requested instructions were faulty."

What the defendant omits to quote is the Court's statement that "Because the court failed to clearly inform counsel of its ruling on his requests, counsel's closing argument was based upon a theory of defense which the court rejected, or at least ignored, in its subsequent statements." 339 F.2d at 580. Thus it appeared to the appellate court that the defense counsel's argument was probably less effective because of the trial court's failure. Such cannot be said of the present case.

The Court in *Wright* then concluded: "Carbo . . . and Watada . . . [discussed *supra*] are not to the contrary, for in neither case did it appear that the failure of the court to comply with Rule 30 affected the content of counsel's argument." *Id.* So it is in the present case: The defense counsel himself brought out in the defendant's own testimony that a lesser offense than robbery might have been committed on March 5, 1967. The defendant testified that he intended to take money from the complainants and that he did in fact take money from them. The only factual dispute was over how the money was taken. The Government proposed that it was taken by force; the defense proposed that no force was used. Therefore it is difficult even to imagine how defense counsel's argument could have differed, no matter the charge. How, then, could the court's omitting to mention larceny before argument have been prejudicial to the defendant?

Whatever the error in the trial court's omission, it was completely harmless and in the circumstances below without effect on the defendant's substantial rights—a prerequisite to reversal. Rule 52(a), Federal Rules of Criminal Procedure. This court, in *Cross* v. *United States*, 122 U.S. App. D.C. 283, 285, 353 F.2d 454, 456 (1965), observed that "The relative strength of the evidence against the defendant is a material factor in weighing whether trial errors require reversal." The evidence below, taken as a whole, appears indeed overwhelming. The defendant practically, if not actually, admitted all of the elements of the offenses of which he was convicted. Thus the mere delay of the trial judge in informing counsel

that he would charge on larceny was harmless and without effect on the defendant's substantial rights.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22137

UNITED STATES OF AMERICA

Appellee

-v-

WESLEY WALKER, JR.

Appellant

Appeal From An Order Of The United States District Court

For The District Of Columbia

This Case Was Heard By This Court On February 28, 1969.

Decision Rendered April 28, 1969.

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and
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PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

On April 28, 1969, a three Judge panel of the United States Court of Appeals for the District of Columbia Circuit affirmed the conviction of appellant. From that decision, the appellant petitions for a rehearing en banc predicated on the following grounds:

I

Appellant Walker was indicated for robbery and assault with a dangerous weapon. The jury returned a verdict of guilty on the lesser included offense of grand larceny and not guilty as to assault with a dangerous weapon. The Government's case indicated a robbery at knife point and the defense's position was that at most, the case was one of larceny by trick. The jury's verdict was consistent with larceny by trick and apparently the robbery contention was discarded as evidenced by the verdict.

At the close of the evidence, jury instructions were discussed. The agreed upon substantive charges were robbery and assault with a dangerous weapon. At no time prior to claoing arguments by the respective Counsel was the Larceny charge introduced into the litigation or even discussed. Defense Counsel, it must be assumed, argued his case strictly on the substantive charges discussed and agreed upon prior to final argument.

After summations were completed, the Court and Counsel conferred again and the Trial Judge at that time indicated he was going to instruct on Larceny as a lesser included offense of robbery. Defense Counsel objected but was instructed on Larceny.

II.

Rule 30 of the Federal Rules of Criminal Procedure establishes a procedure whereby proposed instructions are agreed upon prior to final argument so that respective Counsel can tailor their summations to the agreed upon instructions.

Rule 30, Federal Rules of Criminal Procedure:

"At the close of the evidence or at such earlier time during the trial as the Court reasonably directs, any party may file written requests that the Court instruct the Jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. <u>The Court shall inform counsel of its proposed action upon the requests prior to their arguments to the Jury</u>, but the Court shall instruct the Jury after the arguments are completed. No party may assign as error any portion of the charge thereat before the Jury retires to consider it's verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury." As amended Feb. 28, 1969, eff. July 1, 1966.

Customary practice under Rule 30 dicates that the agreed upon instructions prior to final argument not be altered or added to after summations are completed. SEE WRIGHT V. UNITED STATES, 339R. 2d 578 (9th Cir. 1964)

The three Judge Panel at page 3 of the slip opinion (No. 22, 137) concluded that even if the letter and spirit of Rule 30 was not complied with by the Trial Court, nevertheless such error was not prejudicial to the degree of requiring reversal.

Appellant contends that there is no conditional language in Rule 30. The rule quite clearly states that the Court shall inform Counsel prior to their arguments to the Jury on the Count's proposed instructions. The appellant would submit that anything less than comportment with the rule varnishes over the right of notification to the respective Counsel to argue the case intelligently. In the instant case, defense Counsel could not have intelligently argued on larceny; since it was not, as far as he knew in the proposed instructions and it must be assumed that he relied on the unconditional language of Rule 30 that larceny was not to be instructed upon.

Appellant would further submit that supplementary summations are not customary and not an accepted as noted

by the three Judge opinion at pages 5 & 6 of the slip opinion. In any event, even assuming that such was established practice, it would put defense Counsel in a very embarassing position to try to patch over and possibly refute his original summation. It could and possibly would place the burden on the defense; which is antithetical to the conception of Criminal Jurisprudence that the defendant has no burden of proof.

On this major issue the appellant prays this petition be granted.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing petition for Rehearing was hand delivered to the Office of The U. S. Attorney, this 26 day of June, 1969.

Robert F. Sutphin

Robert J. Kurrle